Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

80-2162

No. _____

IN THE

Supreme Court of the United States

October Term 1980

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

MICHAEL P. GROSS
Carl Bryant Rogers, On Brief
Roth, VanAmberg & Gross
P.O. Box 1447
40 Sena Plaza
Santa Fe, New Mexico 87501
(505) 988-8979
Counsel for Appellants

June 1981

Blue Feather Press, Santa Fe, New Mexico

No. _____

IN THE

Supreme Court of the United States

October Term 1980

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Do federal laws and policies to improve Indian education and promote Indian self-determination preempt New Mexico's Gross Receipts and Compensating Tax Act, §§7-9-1 to 7-9-81, N.M.S.A., 1978, and ancillary State laws, where the tax has nominally been assessed on the proceeds of a non-Indian contractor for work performed on an Indian-owned, federally-funded Indian school construction project located on Navajo Reservation trust

lands in New Mexico under a series of discrete Congressional appropriations to a tribal school board, which sustained the entire economic burden of the tax?

2. Is the tax repugnant to the Constitution, laws, and treaties of the United States because it impermissibly interferes with the ability and right of Navajo Indians to make their own laws and be governed by them?

3. Is the tax repugnant to the Constitution, laws and treaties of the United States because it conflicts with the Indian Trader Statutes, 25 U.S.C. §§261-264 and implementing regulations, 25 C.F.R. Part 252; with 25 U.S.C. §465; with the State's constitutional disclaimer of jurisdiction, New Mexico Constitution, Article XXI, §2, and Enabling Act, §2(B), 36 Stat. 558-559; and with Article 6 of The Navajo Treaty of 1868, 15 Stat. 669?[1]

---

1. Counsel is aware of Rule 28.1 regarding corporations as parties. Neither of the Appellants is owned by any parent company or companies, nor does either of them own a subsidiary company or companies or affiliates. The caption names all parties. Appellant Ramah Navajo School Board, Inc., is an organization of the Navajo Nation under 25 U.S.C. §450b(c) and was incorporated in 1970 as a means to receive federal funds by contract from the Bureau of Indian Affairs. See Statement of the Case, page 14.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1
TABLE OF AUTHORITIES 5
OPINIONS BELOW 8
JURISDICTION 8
CONSTITUTIONAL PROVISIONS INVOLVED .. 9
TREATY INVOLVED 10
STATUTES INVOLVED 11
REGULATIONS INVOLVED 14
STATEMENT OF THE CASE 14
How The Federal Questions Were Presented 17
THE QUESTIONS ARE SUBSTANTIAL 19
CONCLUSION 26
APPENDICES 27
A. Opinion and Order July 1, 1980, Court of Appeals of the State of New Mexico, 625 P. 2d 1225 (N.M. App. 1980) 27
B. Opinion and Order July 11, 1980, on petition for rehearing of the Court of Appeals of the State of New Mexico 35
C. Order Granting Writ and Writ of Certiorari of the Supreme Court of the State of New Mexico, August 14, 1980 38
D. Order March 30, 1981 of the State of New Mexico quashing its Writ of Certiorari and returning the record to the Court of Appeals 41
E. Mandate of the Court of Appeals of the State of New Mexico, April 1, 1981 42

F. Decision with Findings of Fact and Conclusions of Law of the District Court, First Judicial District Court of Santa Fe, State of New Mexico . 44
G. Judgment dismissing claims on the merits of the District Court, First Judicial District, County of Santa Fe, State of New Mexico 56
H. Letter decision February 7, 1978 by Bureau of Revenue 58
I. Notice of Appeal filed in the Court of Appeals of the State of New Mexico May 11, 1981 .. 60
J. Amended Notice of Appeal filed in the Court of Appeals of the State of New Mexico May 22, 1981..... 64
K. Relevant Portions of the New Mexico Gross Receipts and Compensating Tax Act and Municipal Gross Receipts Tax Act, §§7-9-1 to 7-9-81 and 7-19-1 to 7-19-8, N.M.S.A., 1978.....69
L. Relevant Portions of The Indian Self--Determination and Education Assistance Act, 25 U.S.C. §§450-450n and 453-458e 70
M. The New Mexico Disclaimer of Jurisdiction over Indian Lands, Enabling Act, 36 Stat. 558-559, §2(B); N.M. Const., Art XXI, §2 75
N. The Snyder Act, 25 U.,S.C. §13 77
O. Relevant Portions of 25 C.F.R. Parts 271 and 274 78
P. Relevant Portions of 25 C.F.R. Part 31a 83
Q. Relevant Portions of 25 C.F.R. Part 252 86

TABLE OF AUTHORITIES

Cases	Page
Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct.686 (1954)	22
Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980)	9, 16, 18, 20, 24, 25
Evco v. Jones, 81 N.M. 724, 472 P.2d. 987 (N.M. App. 1970)	17
G. M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P. 2d 277 (N.M. App. 1976)	23
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973)	9, 20, 22, 23
Mescalero Apache Tribe v. O'Cheskey, 625 F. 2d 967 (10th Cir. 1980)	24
Ramah Navajo School Board, Inc. v. Bureau of Revenue, 625 P. 2d 1225 (N.M. App. 1980)	8
Tiffany Const. Co. Inc. v. Bureau of Revenue, 93 N.M. 593, 603 P.2d. 332 (N.M. App. 1979)	23
United States v. New Mexico, 581 F. 2d 803 (10th Cir. 1978)	24
United States v. Wheeler, 435 U.S. 313, 55 L.Ed. 2d 303, 98 S. Ct. 1079 (1978)	20
Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242 (1965)	9, 20, 21, 22, 23, 24, 26
Washington v. Conf. Tribes of Colville Res., 447 U.S. 134, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980)	24, 25
White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980)	18, 20, 23, 24, 25
Williams v. Lee, 358 U.S. 217, 3 L. Ed. 2d 251,79 S. Ct. 269 (1959)	9, 21

UNITED STATES CONSTITUTION

Indian Commerce Clause, U.S. Const., Art. I, §8, cl.3 9
Supremacy Clause, U.S. Const., Art. VI, cl. 2 10

TREATIES

Treaty of 1868 with the Navajo Nation, Article 6, 15 Stat. 669 ..... 10, 19, 22, 23

STATUTES

Ramah Navajo School Appropriations Acts, Public Laws 93-120, 93-245, 93-404, 94-165, 95-74 .. 11, 12, 15, 19, 23, 24
New Mexico Enabling Act and Constitutional Disclaimer of Jurisdiction Over Indian Lands, 36 Stat. 558-559, §2(B); N.M. Const., Art.XXI, §2 ..... 14, 17, 23, 75
Indian Self-Determination And Education Assistance Act, Public Law 93-638, 25 U.S.C. §450-450n and 453-385e..... 12, 15, 19, 21, 22, 70
Johnson O'Malley Act, 25 U.S.C. §452 ..... 12, 15
Snyder Act. 25 U.S.C.§13 ..... 14, 21
Public Law 95-561, Title XI, 25 U.S.C. §§2001-2019..... 12, 21, 22
New Mexico Gross Receipts and Compensating Tax Act and Municipal Gross Receipts Tax Act, §§7-9-1 to 7-9-8 and 7-19-8, N.M.S.A., 1978 ..... 11, 16, 23, 24, 26, 69
25 U.S.C. §465 ..... 13, 23
Indian Trader Statutes, 25 U.S.C.§§*261-264* 13, 25

REGULATIONS

25 C.F.R. Part 271 ..... 14, 21, 78
25 C.F.R. Part 274 ..... 14, 21, 78
25 C.F.R. Part 31a 14, 21, 83
25 C.F.R. Part 252 ..... 14, 16, 25, 86

OTHER

Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy", 56 Texas L. R. 1195 (1978) 19

S. Report No. 91-501, 91st Congress, 1st Session (1969), "Indian Education: A National Tragedy -A National Challenge" 19

President's Message to Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970) 19

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New Mexico affirming the judgment for Appellee in the trial court is reported at 625 P. 2d 1225 (N.M. App. 1980), Appendix A. The opinion and order of the Court of Appeals of the State of New Mexico July 11, 1980, denying Appellants' petition for rehearing is unreported, Appendix B.

JURISDICTION

This is a civil action for recovery of State gross receipts taxes imposed on a non-Indian contractor on receipts from a federally-financed, Indian-owned school construction project on Navajo Reservation trust lands. The major claim presented throughout is that the tax cannot be imposed on the receipts from this project because it unavoidably burdens a tribal school and is thus preempted by federal policies, laws, regulations, a treaty, and various U.S. Constitutional provisions. The trial court rendered a decision and judgment dismissing the complaint, Appendices F & G, holding that the tax is not preempted by federal law and does not interfere with Navajo self-government. On July 1, 1980, the Court of Appeals of the State of New Mexico affirmed, denying a petition for rehearing on July 11, 1980. On August 14, 1980, the Supreme Court of the State of New Mexico granted a writ of certiorari, Appendix C, to review the decision of the Court of Appeals. The parties filed briefs on the merits and the Navajo Nation was allowed to file an *amicus curiae* brief in support of Appellants. The Supreme Court of the State of New Mexico quashed its writ of certiorari on its own motion on March 30, 1981 and the Court of Appeals, to whom the record was returned, issued its

mandate on April 1, 1981, now making its decision final, Appendices D & E. Appellants filed their notice of appeal to the United States Supreme Court in the Court of Appeals of the State of New Mexico, Appendix I, on May 11, 1981.[2]

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).[3]

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, §8, Clause 3; Article VI, Clause 2:

The Congress shall have Power. . . to

---

2. Appellants filed an amended notice of appeal and proof of service in the Court of Appeals of the State of New Mexico on May 22, 1981, Appendix J. Comparable notices of appeal were filed and cross-filed in the Supreme Court of New Mexico and the Trial Court on May 11, 1981, May 22, 1981, and April 29, 1981.

3. Many of the precedents which Appellants rely upon in this appeal were cases reviewed by this Court on Appeal. *Warren Trading Post, Co., v. Arizona Tax Comm'n.* 380 U.S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242 (1965), *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980). In the event the Court determines it does not have appellate jurisdiction, Appellants pray that the Court treat this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3) and 28 U.S.C. § 2103. The importance of the issues here in terms of Indian education and self-determination are compelling enough to justify the exercise of this Court's discretionary certiorari jurisdiction as was done in other Indian jurisdiction cases presenting different problems, e.g., *Williams v. Lee,* 358 U.S. 217 3 L.Ed. 2d 251, 79 S. Ct. 269 (1959).

regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

This Constitution and the Laws of the United States which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

TREATY INVOLVED

The Treaty of 1868 between the United States of America and the Navajo Tribe of Indians, concluded June 1, 1868; Ratification advised July 5, 1868; proclaimed August 12, 1868 (15 Stat. 669), Article 6:

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who shall reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than ten years.

STATUTES INVOLVED

1. The relevant portions of the New Mexico Gross Receipts and Compensating Tax Act, §7-9-1 through 7-9-81, N.M.S.A., 1978, and Municipal Gross Receipts Tax Act, §7-19-1 *et.seq.*, N.M.S.A., 1978, are reproduced in Appendix K.

2. The appropriation acts of Congress for construction of school facilities for the Ramah Navajos read in relevant part:

> *Public Law 93-120, 87 Stat. 431:*
> For construction, major repair and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services contract, $53,703,000 to remain available until expended. . . .
>
> *Public Law 93-245, 87 Stat. 1073.*
> Provided further, That $2,700,000 of the amount appropriated under this heading in the Department of the Interior and Related Agencies Appropriation Act, 1974, shall be available for assistance to the Ramah Navajo School Board, Incorporated, New Mexico, for the construction of school facilities.
>
> *Public Law 93-404, 88 Stat. 810:*
> Provided further, That not to exceed $1,195,000 shall be available to assist the Ramah Navajo Board, Inc., including not to exceed $800,000 for construction of school facilities and not to exceed $395,000 for purchase of school equipment.

Public Law 94-165, 89 Stat. 985:
Provided further, That not to exceed $2,229,000 shall be available for assistance to the Ramah-Navajo School Board, Incorporated, New Mexico, for the construction of school facilities.

Public Law 95-74, 91 Stat. 293:
Provided further, That not to exceed $2,062,000 shall be available for assistance to the Ramah-Navajo School Board, Incorporated, New Mexico, for the construction of an Instructional Media Center.

3. The relevant portions of the Indian Self-Determination Act, 25 U.S.C. §450-450n, and §452-458e Public Law 93-638, January 4, 1975, 88 Stat. 2203-2217, are reproduced in Appendix L.

4. 25 U.S.C. 2010, Public Law 95-561, Title XI, §1130, November 1, 1978, 92 Stat. 2321:

> It shall be the policy of the Bureau in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.

5. The Johnson O'Malley Act 25 U.S.C. 452, April 16, 1934 c. 147, §1, 48 Stat. 596; June 4, 1936, c. 490, 49 Stat. 1458:

> The Secretary of the Interior is authorized, in his discretion, to enter into a contract or contracts with any State or Territory, or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distrees, of Indians in such State or Territory, through the

agencies of the State or Territory or of the corporations and organizations, herein before named and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance and social welfare, including relief of distress, of Indians in such State or Territory.

6. 25 U.S.C. 465, Act of June 18, 1934, c. 576 §5, 48 Stat. 985, in relevant part reads:

. . . .Title to any lands or rights acquired pursuant to §461, 462, 463, 464, 465, 466-470, 471-473, 474-475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

7. The relevant portions of the Indian Trader Statutes read:

25 U.S.C. 261, Aug. 15, 1876, c. 289, §*5, 19 Stat. 200.*

Power to appoint traders with Indians — The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

25 U.S.C. §262, March 3, 1901, c. 832, §1, 31 Stat. 1066; March 3, 1903, *c. 994, §10, 32 Stat. 1009.*

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of In-

dian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

8. The New Mexico Disclaimer of Jurisdiction Over Indian Lands, N.M. Const. Art. XXI, §2; Enabling Act, §2(B), June 20, 1910, 36 Stat. 558-559, is reproduced in Appendix M.

9. Relevant portions of the Snyder Act, 25 U.S.C. §13, Nov. 2, 1921, c. 115, 42 Stat. 208, are set out in Appendix N.

REGULATIONS INVOLVED

1. The relevant portions of the regulations implementing the Indian Self-Determination Act, *supra,* found at 25 C.F.R. Parts 271 and 274, are reproduced in Appendix O.

2. The relevant portions of the regulations implementing Title XI of Public Law 95-561, *supra,* found at 25 C.F.R. Part 31a, are reproduced in Appendix P.

3. The relevant portions of the regulations implementing the Indian Trader Statutues, *supra,* 25 C.F.R. Part 252, are reproduced in Appendix Q.

STATEMENT OF THE CASE

Appellant Ramah Navajo School Board, Inc., is a wholly Indian-owned and controlled tribal organization of the Navajo Nation under 25 U.S.C. §450b(c). The Appellant Lembke Construction Co., Inc., is a New Mexico for-profit corporation operating a building construction firm based in Albuquerque, New Mexico. In 1970 the Ramah Navajo Chapter, a tribal subdivision, organized the Board and authorized its incorporation as a New Mexico non-profit corporation, a precondition for receiving funds by

contract from the Bureau of Indian Affairs for the purpose of operating a school for Navajo children.[4]

The Board's school replaced a public high school which the State of New Mexico had closed in 1968. The new school allowed Navajo children to return to a community day school from the distant federal Indian boarding schools to which they had been sent after the public school closed. Though started as a high school, the Navajo school now enrolls approximately 450 Navajo elementary and high school children. Because the initial facilities used by the Board were inadequate, Congress appropriated funds in a series of enactments from 1972 through 1977 for the construction of new school facilities. These appropriations were unusual. They were directed specifically to the Board, which has legal title to the new facilities, the Interior Department serving primarily as a conduit for the funds. Each appropriation contained language providing that the monies were to be used "for the construction of school facilities" by the Ramah Navajo School Board Inc., or words to that effect. In Public Law 93-245, 87 Stat. 1073, Congress amended its original construction appropriation, Public Law 93-120, 87 Stat. 431, to make these points explicit.

The school facilities were to be, and in fact were, built on Navajo Reservation trust lands in then Valencia County (now Cibola County), New Mexico, leased to the Board by

---

4. Until passage of The Indian Self-Determination Act, *supra*, in 1975, Ramah's contracts were issued under the authority of the Johnson O'Malley Act, 25 U.S.C. §452, which the BIA interpreted at the time to require State incorporation as a precondition for a contract. Since 1975, Ramah's operating contracts have been written under the authority of The Indian Self-Determination Act, *supra*, 25 U.S.C. §450f, which the BIA has interpreted not to require State incorporation.

the Navajo Tribe. The federal construction monies were disbursed through contracts between the Board and the Interior Department's Bureau of Indian Affairs obligating the Board to construct the facilities. The construction project began in 1974 with bids from construction firms in the area. Only two firms, both non-Indian owned, submitted bids and Appellant Lembke Construction Co., Inc., the low bidder, received the award of a subcontract (denominated a "contract" in the written instruments) to perform the labor and provide necessary materials. The subcontract was approved by the Bureau of Indian Affairs. When succeeding phases of construction were funded by Congress, the Board issued successive subcontracts to Lembke, also with the BIA's concurrence. By overseeing its prime contracts with the Board, the BIA also oversaw the contracts with Lembke.[5] Each contract with Lembke contained a provision under which the Board was required to reimburse Lembke for all taxes in the nature of sales taxes for which Lembke might be assessed on account of its work on this project. Both bidders had insisted on such a provision in their bids.

New Mexico levied its gross receipts tax, §§7-9-1 through 7-9-81, N.M.S.A., 1978, on Lembke's receipts from work on the Ramah Navajo school project. In turn, as called for in the contracts with Lembke, the Board reimbursed Lembke the full amount of the tax, some $232,000 by the date of the trial court's judgment. The Board thus sustained the entire burden of the tax and continues to sustain it (pending final disposition of this case). New Mexico's gross receipts tax, nominally denominated atransaction privilege tax,

5. The record does not show that Lembke was licensed under the Indian Trader regulations, 25 C.F.R. Part 252, but as noted, its involvement with this project was subject to on-going BIA supervision. *Compare, Central Machinery Co. v. Arizona Tax Comm'n, supra,* 65 L.Ed. 2d, at 689, n.4

is almost always passed on to consumers in this fashion and therefore operates more like a sales tax than an excise tax. This has been recognized by the Courts of New Mexico. *Evco v. Jones,* 81 N.M 724, 729, 472 P. 2d 987 (N.M. App. 1970), *rv'd on other grds.* at 409 U.S. 91, 34 L. Ed. 2d 325, 93 S. Ct. 349 (1972).

In significant part, the unavoidable tax burden imposed on the Navajo Board has prevented completion of the facilities. The Board still lacks planned classroom space, landscaping, permanent administrative offices and a permanent cafeteria among other facilities needs. Lembke is obligated to pay over to the Board the proceeds, if any, it may receive from this action. The Navajo Nation, which filed an *amicus curiae* brief in the Appellant's favor in the Supreme Court of the State of New Mexico, considers education to be one of its principal governmental services and has promoted and supported the Ramah Navajo School Board since its inception.

How the Federal Questions Were Presented —

After exhausting State administrative remedies, Appendix H, the Appellants commenced this action by filing a civil complaint in the District Court, First Judicial District, County of Santa Fe, State of New Mexico, for a refund of gross receipts taxes. The complaint alleged in part that "the tax constitutes interference by the State of New Mexico in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States"; "the imposition of the tax in question violates New Mexico's Constitutional disclaimer of jurisdiction over Indian lands" (N.M. Const. Art. XXI, §2, 36 Stat. 558-559); and that "the Supremacy Clause, U.S. Constitution Art. VI, cl. 2, bars imposition of this tax because its collection burdens or interferes with a

clear federal policy and program for the education of Indian children".

The federal preemption issues were tried to the Court, which rendered a decision and judgment based on Findings of Fact and Conclusions of Law reproduced in Appendices F and G holding that the tax in question is valid because it does not interfere with "the right of Navajo Indians to make their own laws and be governed by them" and because the tax "is not prohibited by reason of the Supremacy Clause of the United States Constitution and the doctrine of preemption."[6]

Appellants appealed to the Court of Appeals of the State of New Mexico, arguing that the tax in question was preempted by federal law, including the Indian Trader Statutes, *supra.* and 25 U.S.C. §465.On July 1, 1980, the Court of Appeals affirmed the trial court's judgment, Appendix A. Appellants filed a petition for rehearing on the grounds that the Court of Appeals had not taken into account this Court's two decisions of last Term in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980); and *Central Machinery Co. v. Arizona State Tax Comm'n.,* 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980). On July 11, 1980, the Court of Appeals denied the petition for rehearing in an unpublished opinion reproduced in Appendix B.

Appellants then filed a petition for a writ of certiorari in the Supreme Court of the State of New Mexico, again raising the preemption issues presented in the courts below.

---

6. A subsidiary Claim based on a statutory exemption was also decided against the Appellants. The statutory exemption claim is not a part of this appeal.

On August 14, 1980, the Supreme Court of the State of New Mexico granted the petition, Appendix C, but on March 30, 1981, after briefs on the merits had been filed by the parties and by the Navajo Nation as *amicus curiae,* the Supreme Court of the State of New Mexico quashed its writ as having been improvidently granted and returned the record to the Court of Appeals without opinion, Appendix D.

THE QUESTIONS ARE SUBSTANTIAL

1. This case involves a conflict between the taxing power of a State and a comprehensive scheme for the improvement of Indian education, a "major national goal", 25 U.S.C. §450a(c).

In 1969, the Senate Subcommittee on Indian Education referred to Indian Education as "a national tragedy - a national challenge". S. Rep. No. 91-501, 91st Cong., 1st Session. The Ramah Navajo School played a significant role as a model for subsequent reforms first introduced administratively, later codified in federal laws including the Self-determination Act. The central point of these reforms has been to provide Indian communities the means to control their children's education, an objective which the State tax involved here has directly and undeniably impeded. 25 U.S.C. 450(b)(3). See, e.g., President's Message to Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970); Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy", 56 Texas L. R. 1195 (1978).

To accomplish the national goal at Ramah and fulfill a longstanding treaty obligation under Article 6 of the Treaty of 1968, 15 Stat. 669, Congress earmarked funds to Appellant Ramah Navjo School Board, a tribal organization of

the Navajo Nation, for construction of new school facilites for Indian children. Each appropriation expressly identifies school facilities construction or the like as its purpose. New Mexico's tax directly prevents fullfillment of Congress' intention. The tax has diverted and, until this case is finally decided, continues to divert a substantial amount of resources from this unfinished project. School facilites planned and paid for by the Congress are still not fully available for Ramah Navajo children.

The tax is therefore in conflict with *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 65 L.Ed. 2d 665, 100 S. Ct. 2578 (1980), and *Central Machinery Co., v. Arizona State Tax Comm'n.,* 448 U.S. 160, 65 L. Ed. 2d 684, 100 S. Ct. 2592 (1980), which dealt with similar taxes imposed, nominally, on non-Indian businesses but affecting protected Indian economic activities. The undisputed principles undergirding those decisions were summarized by Mr Justice Marshall in *Bracker, supra,* 100 S. Ct., at 2583:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, §8, cl. 3. See *United States v. Wheeler, supra,* 435 U.S. at 322-323, 98 S.Ct., at 1085-1086. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. See, e.g., *Warren Trading Post Co. v. Arizona Tax Comm'n.,* 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965); *McClanahan v. Arizona State Tax Comm'n., supra.* Second, it may unlawfully infringe "on the right of reservation Indians to

> make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269, 271 (1958). (additional citations and discussion omitted)

Because of pervasive federal regulation of the activities affected by the Arizona taxes involved in both cases and the absence of an overriding State interest in collecting the taxes, the Court held that the State statutes involved in each case could not be imposed nor the taxes collected.

The instant case is stronger than any of the earlier decisions. Here the futures of Indian children are directly affected. In previous decisions on issues of this kind only Indian economic interests and the federal government's desire to advance them were involved. For example, in *Warren Trading Post Co. v. Arizona Tax Comm'n.,* 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965), a unanimous decision holding that Arizona's gross receipts tax could not be assessed on the earnings of a non-Indian trading post licensee because of conflict with the same comprehensive federal trader regulation scheme involved here, Indians were not even parties. Yet here, contrary to the Court of Appeals' opinion on rehearing, there is not just one federal regulatory scheme involved but two, covering both business activities and, most uniquely, Indian education and *school construction,* activities at least as comprehensively regulated by federal law as any other. See, e.g. 25 U.S.C. §§450-450n, 452-458e, 25 U.S.C. §13, 25 U.S.C. §§2001-2019, and implementing regulations, especially 25 C.F.R. Parts 271, 274, and 31a., representing only a portion of federal legislation on Indian education.

Thus, along with violating the federal regulations on business activities (which are stronger on the Navajo Reservation than those on most other reservations), and on school construction, the State tax here directly interferes

with the Navajos' statutorily protected right to maximize local control over educational programs, 25 U.S.C §2010, and take over control of federal educational programs, 25 U.S.C., §450a(c); directly infringes upon Navajo education treaty rights,Art. 6, Treaty of 1868, 15 Stat. 669; and directly impedes the exercise of Navajo self-government by interfering with a central prerequisite for meaningful execise of that function — an educated citizenry. *Brown v. Board of Education,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

2. The decision below deals only cursorily with the unique status of the Navajo Reservation in federal law, a status largely derived from the Navajo Treaty of 1868, Article 6 of which obligates the United States to furnish school houses for Navajo children. This Court unanimously recognized this special status when it stated in *Warren Trading Post Co., supra,* 380 U.S., at 690:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. *And in compliance with its treaty obligations* the Federal Government has provided for roads, *education,* and other services needed by the Indians. (Emphasis added)

This Court reemphasized the point in *McClanahan v. Arizona State Tax Comm'n, supra,* 411 U.S. 164, at 173, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973), when it said, in the course of barring the imposition of a State income tax on a Navajo living and working on the Navajo Reservation:

> The beginning of our analysis must be with the Treaty which the United States Government entered with the Navajo Nation in 1868.[7]

The State of New Mexico has already diverted over $232,000 of the amount Congress has provided to fulfill an express Treaty commitment to build school houses for Navajos at Ramah and elsewhere. Instead of focusing on the Treaty provision, the decision below suggests that the tax is proper because none of the specific appropriations for this project expressly forbids it. Yet each of these enactments contains language expressing Congress' intent that the money be used by this Indian Board for the erection of school facilities. The necessary implication is that the money is not intended to pay taxes of this kind to the State of New Mexico. No express prohibition is needed. See, *White Mountain Apache Tribe, supra,* 100 S. Ct., at 2584. By treaty and direct appropriations, Congress forged a partnership with a remote Navajo community to improve its children's education. New Mexico's tax intrudes on this partnership and cannot be sanctioned.

In addition, the decision below fails to assess the impact of 25 U.S.C. §465 or the New Mexico Disclaimer of Jurisdiction over Indian lands, Enabling Act, §2(B), 36 Stat. 558-559, N.M. Const., Art. XXI, §2, either of which arguably disposes of this case. Instead, the decision below relies principally on *G.M. Shupe, Inc. v. Bureau of Revenue,* 89 N.M. 265, 550 P. 2d 277 (N.M. App. 1976), and *Tiffany Const. Co. v. Bureau of Revenue,* 93 N.M.

---

7. *McClanahan, supra,* 411 U.S., at 170, n. 6, states that *Warren Trading Post Co., supra,* cannot be restricted to cases involving Indian traders and: "It is thus unsurprising that this Court has interpreted the Navajo Treaty to preclude extension of state law — including state tax law — to Indians on the Navajo reservation", *Ibid,* at 175, citing *Warren, supra* and *Williams, supra.*

593, 603 P.2d. 332 (N.M. App. 1979); remanded ____U.S.____; reaffirmed ____N.M.____, ____State Bar Bulletin (June____, 1981), in which there was no Indian involvement; on *United States v. New Mexico,* 581 F. 2d 803 (10th Cir. 1978), which also did not deal with Indians; on *Washington v. Conf. Tribes of Colville Res.,* 447 U.S. 134, 65 L.Ed. 2d 10, 100 S. Ct. 2069 (1980), which dealt primarily with State versus tribal tax competition and the legality of an artificial tribal tax haven, neither of which is involved here; and on *Mescalero Apache Tribe v. O'Cheskey,* 625 F. 2d 967 (10th Cir. 1980), *reh. den.,* 625 F.2d 991,U.S. *certiorari denied,* ____U.S.____, 49 U.S. Law Week 3619, February 23, 1981, which did not deal with Navajos, education, or direct appropriations to an Indian school board in furtherance of "a major national goal".[8]

3. If allowed to stand, the decision below will effectively institute a different rule of taxation for Navajos living in New Mexico as compared with Arizona. Although the New Mexico tax involved here is identical in form to the Arizona taxes held invalid in *Warren Trading Post Co., supra,* (not even cited below); *White Mountain Apache Tribe, supra;* and *Central Machinery Co., supra,* the accident that a Navajo resides in the New Mexico portion of this vast reservation will mean that he must sustain the tax burden while his Navajo relatives in Arizona do not. As justification for this anomaly, the New Mexico Court of Appeals resorts to mechanical application of a discredited labeling test, ruling

8. *Mescalero* was an en banc decision upholding application of New Mexico's Gross Receipts Tax on a non-Indian building contractor of a tribal resort complex and housing on the Mescalero Apache Reservation. The decision is based entirely on the legal incidence of the tax, a mechanical test strongly attacked in dissents by Judges McKay and Doyle.See point 3 below.

that the sole fact that the "legal incidence" of New Mexico's tax nominally falls on a non-Indian renders the tax lawful.

The State Court's approach violates this Court's repeated strictures against such mechanical tests in cases of this sort. See, e.g., *White Mountain Apache Tribe, supra, 100 S. Ct., at 2584, and Central Machinery Co., supra,* 100 S. Ct., at 2595, footnote 3, where Mr. Justice Marshall expressly rejected the notion that a state's label could validate a state tax levied upon on-reservation transactions where that tax could "disturb and disarrange" a federal statutory plan to protect reservation Indians. See also *Washington v. Conf. Tribes of Colville, supra,* 100 S. Ct., at 2086. The Court requires that "particularized" inquiries be conducted examining "the relevant treaties and statutes in terms of the broad policies that underlie them and the notions of tribal sovereignty that have developed from historical traditions of tribal independence" and "the nature of the State, Federal, and tribal interests at stake". The examination is to determine whether, "in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe, supra,* 100 S. Ct., at 2584. The New Mexico Court of Appeals has manifestly failed to conduct such an examination here.

Finally, the decision below also neglects to deal fully with the Indian trader statutes and not at all with the special Navajo regulations thereunder, 25 U.S.C. §§261-264 and 25 C.F.R. Part 252. The statutes were found dispositive in *Central Machinery Co., supra,* which involved a one-time sale of farm equipment to a tribal enterprise by an off-reservation, unlicensed, non-Indian. Those facts are substantially weaker than those in this record involving a multi-year, multi-million dollar construction project supervised under contract by the Bureau of Indian Affairs. Hence, the Indian trader statutues would seem to apply here with even greater preemptive force.

Closer examination of these factors by the State Court would have revealed a federal and tribal interest to protect this Indian school construction project from State interference far in excess of the revenue-raising interest of New Mexico, an interest that necessarily shrank after the State's 1968 action cutting off State educational services to most Ramah Navajo high school children.

In short, the decision below fails to make the requisite "particularized" inquiry, neglects to examine fully the special status of the Navajo Nation and this project in federal law, and conflicts with several major precedents of this Court dealing with identical taxes assessed on the same reservation by the State of Arizona, thus tending towards a duality which would create different rules of taxation for the two largest segments of this tribe of approximately 150,000 people. The State's tax has thus "disturbed and disarranged the statutory plan Congress set up", *Warren Trading Post, supra,* 380 U.S., at 691, to improve Indian education at Ramah, regulate business activities on the Navajo Reservation, and promote Navajo tribal self-government. The decision below must therefore be reversed.

CONCLUSION

For these reasons the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, or summary reversal.

Respectfully Submitted:
MICHAEL P. GROSS
Carl Bryant Rogers, On Brief
Roth, VanAmberg and Gross
Suite 40, Sena Plaza
P.O. Box 1447
Santa Fe, New Mexico 87501
Counsel for Appellants

June 1981.